No. 8600

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE DRYDOCK COMPANY (a corporation), *Appellant,*

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND (a widow), and KENNETH HOWLAND (a minor), *Appellees.*

BRIEF FOR APPELLEE, WARREN H. PILLSBURY.

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RESTATEMENT OF THE CASE.

We believe that appellant's statement of the case goes beyond the issues involved in this appeal. To restate the case concisely, it appears that on February 26, 1937, appellees Margaret and Kenneth Howland, dependent widow and minor child, respectively, of appellant's deceased employee (hereinafter called "claimants"), filed their claim for compensation with the United States Employees Compensation Commission. Thereafter, and subsequent to proper notice and hear-

ings on said claim, appellee Pillsbury, as deputy commissioner, under the Longshoremen's and Harbor Workers' Compensation Act (33 USC 901 et seq.), awarded compensation to claimants.[1]

Appellant then instituted proceedings in the court below to suspend and set aside said award, contending, in Paragraph XVI of the complaint only, that a temporary injunction was necessary to prevent irreparable damage.[2] Claimants and appellee Pillsbury were then directed to appear and show cause why, pending the final determination of the proceedings, the award should not be temporarily suspended and set aside and appellant be relieved temporarily from complying with the terms of the award.[3]

A return to the order to show cause was then filed stating that allegations similar to those contained in Paragraph XVI of the complaint, namely, that the financial irresponsibility of claimants and their inability to respond to any judgment that appellant might recover against them for payments made under the award in the event that said award was eventually suspended and set aside, do not constitute irreparable damage so as to entitle appellant to apply for and receive a temporary injunction.[4]

On June 10, 1937, after argument upon the allegations of Paragraph XVI only, the order to show cause was dismissed and the application for temporary injunction denied.[5] It is from this order and finding

1. Paragraph VIII of Appellant's Complaint; transcript of record, p. 5.
2. Transcript of record, p. 10.
3. Transcript of record, p. 22.
4. Transcript of record, p. 24.
5. Transcript of record, p. 25.

that the allegations of Paragraph XVI do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen's Act (33 USC 921), that appellants are appealing to this court.[6]

The first two of appellant's assignment of errors[7] may be combined into one question, namely, does claimants' financial irresponsibility, plus the fact that they are now judgment-proof constitute a sufficient showing so that the trial court may be held to have abused or improvidently exercised its discretion in denying appellant's application for temporary restraining order under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 921 (b))?

By the third assignment of error, appellant contends that the lower court erred in exercising its discretion in denying the application for a temporary restraining order thereby subjecting appellant to the alleged punitive provisions of Section 14 (f) of said Act (33 USC 914 (f)). The novelty of this argument, although striking, is no longer effective. This court, in a similar case, has joined with the Circuit Court of Appeals for the Second Circuit and definitely ruled that the provisions of that Section 14 (f) are valid to impose additional compensation for unauthorized delay in the payment of compensation previously awarded.

Arrow Stevedore Co. v. Pillsbury (February 15, 1937), 88 F. (2d) 446 (CCA-9);
Candado Stevedoring Corporation v. Lowe, 85 F. (2d) 119 (CCA-2).

6. Transcript of record, p. 27.
7. Transcript of record, p. 29.

The foregoing cases also require the employer to continue the payment of compensation as awarded while litigation is pending before the District Court, subject to paying twenty per cent additional compensation under Section 14(f) for unauthorized failure to do so.

ARGUMENT.

THE DENIAL OF INTERLOCUTORY INJUNCTIONS IN THESE CASES IS STARE DECISIS.

The order of the lower court, denying appellant's application for a temporary restraining order, should be affirmed in accordance with the rule expressed by the Supreme Court, speaking through Justice Sutherland, in Alabama v. United States, 279 US 229, at pages 230, et seq.:

> "It is well-established doctrine that an application for interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. (Citing authorities.) * * * The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

Equally venerated along with the so-called settled meaning and construction of the phrase "irreparable damage" which appellant desires this court to apply to Section 21 (b) of the Longshoremen's Act, this rule as expressed by Justice Sutherland, has long been applied

by three-judge federal courts in cases involving attempts to enjoin the enforcement of orders of various commissions, both state and federal, similar to the United States Employees Compensation Commission.

Cambridge Electric Light Co. v. Atwill, 25 F. (2d) 485, 486, et seq. (D. C. Mass.);

Albee Godfrey Whale Creek Co. v. Perkins, 6 F. Supp. 409, 411 (N. Y.—Opinion by L. Hand, J.);

Koppers Gas & Coke Co. v. U. S., 11 F. Supp. 467, 469 (Minn.);

Henderson Co. v. Thompson, 12 F. Supp. 519, 521 (Tex.).

In failing to recognize the distinction between applying the rule followed in the above cited cases to this case and not being able to apply the same to other authorities cited by appellant, in contending that the distinction between applications for interlocutory injunctions as compared to final decrees is entirely immaterial,[8] appellant has unquestionably weakened his contention that the lower court erred in exercising its discretion to deny appellant's application for an interlocutory injunction.

In this connection, may it be argued that the discretion of the lower court was improvidently exercised or abused in denying appellant's application to enjoin an order of the United States Employees Compensation Commission awarding compensation to claimants? Emphatically, no! Section 21 (b) of the Longshore-

8. Brief for appellant, pp. 10, 11.

men's and Harbor Workers' Compensation Act (33 USC 921 (b)) provides in part:

> "The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer."

To determine whether or not the lower court abused or exercised its discretion improvidently in denying appellant's application for temporary restraining order under Section 21 (b), this court must first decide whether or not the lower court could have specifically found that irreparable damage would, upon denial of such application, ensue to appellant as the employer of claimants' deceased husband and father, because Section 21 (b) goes on to provide:

> "The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage."

From the limited showing made in the allegations of the application contained in Paragraph XVI of the complaint, the court below, sitting in equity, was powerless to specifically find that irreparable damage, specifying the nature of the same, would ensue to appellant without inequitably and unjustly abusing

its discretion simultaneously to claimant's irreparable damage in not having immediate possession of the compensation awarded and, no doubt, sorely needed, although still withheld. The lower court had no alternative but to deny appellant's application in accordance with a rule already adopted by this court in Brehme v. Watson, 67 F. (2d) 359, where, speaking through Judge Garrecht, it was said on page 361 that:

> "If the facts conclusively show that it would be inequitable and unjust to award a restraining order, the court has no discretion in the matter but must refuse it."

Inability of the lower court in this case to satisfy the requirements of Section 21 (b) from the sketchy showing made by appellant, deprived that court of discretion. The denial of appellant's application was, therefore, equitable and just under the circumstances. As emphasized by the late Justice Holmes in Mass. State Grange v. Benton, 272 US 525, at pages 527, et seq., irreparable damage is synonymous with great injury to the person alleged to be damaged and although power exists in the federal courts to temporarily enjoin injurious acts of lesser magnitude such decrees, even though valid, are nevertheless erronous and subject to reversal.

As already stated, appellant, as plaintiff below, necessarily rested its application for interlocutory injunction upon the allegations of paragraph XVI of its complaint, which reads as follows:

> "That neither said award, nor any part thereof, has as yet been paid by plaintiff and unless pay-

> ment of the amounts required by the said award shall be stayed pending final decision in this suit, plaintiff will be required to pay under the terms of said award, large amounts of money, and in the event that final decision of this suit should be that the said award is void and of no effect, plaintiff will be unable to recover payments made under said award for the reason that defendants, Margaret Howland and Kenneth Howland, are financially irresponsible and have insufficient means to respond to any judgment which plaintiff might recover against them, to plaintiff's great and irreparable damage."

In other words, the only irreparable damage which appellant claimed is based on successive contingencies. If the compensation pending final hearing was paid as awarded and if the award was subsequently set aside, appellant would be precluded from recovering the same if claimants at some indefinite future date were, in fact, judgment proof. This claim, contingent as we say upon hypothetical circumstances without regarding the possibility of claimants' future ability to respond to a judgment, has, in so far as the same may be proof of irreparable damage, been consistently repudiated by the federal courts as wholly inequitable and unjust.

Judge Ritter, whom appellant is inclined to condemn for adopting a reasonable interpretation of the phrase "irreparable damage", as used in Section 21(b),[9] speaking for the District Court of Florida in Continental Casualty Co. v. Lawson (1932), 2 F.

9. Brief for appellant, pp. 12-14.

Supp. 459 (reversed on other grounds, 64 F. (2d) 802), said, at page 460:

> "The petition alleges that Roberts is insolvent, is profligate, wastes his earnings and drinks intoxicating liquors to excess, and the evidence submitted is that the employee is impecunious, and his character and financial condition are such that no recovery probably can ever be had from him in the event the compensation order of the commissioner is set aside in whole or in part. Such a condition, it is asserted, is sufficient to meet the irreparable injury to the employer contemplated by the act. I do not think this is the meaning of the section under consideration. *If such were its intent, it would be in only a few instances where an injunction would be refused.* The purpose of the law is that where the compensation award may be too heavy for the employer, as a self-insurer, to pay without practically taking all his property or rendering him incapable of carrying on his business, or where, by reason of age, sickness, or other circumstances, a condition is created which would amount to irreparable injury."[10]

Contrary to appellant's statement,[11] the reason for the rule adopted by Judge Ritter, as hereinabove italicized, could not upon proper application grossly discriminate against the employer who has secured the payment of compensation by insurance and the adequately financial self-insurer. Each must pay an award of compensation when properly ordered to do so, in liquidation of an equal responsibility demanded of each

10. Italics ours.
11. Brief for appellant, p. 14.

of them in Section 32 (a) of the Longshoremen's Act (33 USC 932 (a). Furthermore no distinction in kind is made as to this responsibility between self-insurers and insurance companies since Section 2 (5) of the same Act defines both to be "carriers". There is absolutely no claim or showing that appellant, a self-insurer, has been rendered incapable of carrying on business or was, or is financially burdened in any manner by the award to claimants beyond that pledged under Section 32 (a) of the Act, so as to deprive appellant of any of its property other than that already held for payment under Section 32 (a).

In fact if appellant is properly financed as a self-insurer pursuant to Section 32 of the Longshoremen's Act, and no showing has been made to the contrary, the payment of award to claimants would not possibly mean a real loss to appellant, let alone rendering appellant incapable of carrying on its business or causing an uncontemplated financial burden.

In Robins Dry Dock & Repair Co. v. Locke, 1933 A. M. C. 467, the United States District Court for the Eastern District of New York, after quoting from Section 21 (b), said:

> "This the plaintiff has not shown, as it is not sufficient to show, even, that the plaintiff would, because of the financial condition of the one to whom the award was directed to be paid, be unable to recover the amount paid if successful; but plaintiff under the law was bound to show a damage which the plaintiff will not be able to stand, and there is no such showing of any such facts. Steamship Terminal Operating Corpora-

tion v. Jerome G. Locke, U. S. D. C. S. D. N. Y., Equity 45-303, unreported opinion of Judge Knox, dated April 24, 1930; Lumber Mutual Casualty Co. v. Locke, Equity No. 53-327, U. S. D. C. S. D. N. Y., unreported opinion of Judge Woolsey, dated June 17, 1930; Globe Indemnity Co. v. Locke, Equity No. 5352, U. S. D. C. E. D. N. Y., unreported opinion of Judge Inch, dated January 9, 1931; Travelers Insurance Co. v. Locke, Equity No. 5103, U. S. D. C. E. D. N. Y., unreported opinion of Judge Byers, dated May 25, 1930; Candado Stevedoring Corp. v. Locke, Equity 5503, U. S. D. C. E. D. N. Y., unreported opinion of Judge Inch, dated July 2, 1931; M. P. Smith & Sons Co., Inc. v. Clark, et al, 1932 A. M. C. 143, Equity 5585 (E. D. N. Y.), opinion of Judge Campbell.

Motion for an interlocutory injunction denied."

A recent decision within the ninth circuit rendered by Judge Bowen, speaking for the District Court of Washington, in Paramino Lumber Co. v. Marshall (1937), 18 F. Supp. 645, 647, reiterated judicial disapproval of appellant's showing, properly found to be inadequate by the lower court.

"No equity jurisdiction to proceed for injunctive relief appears except that dependent upon alleged irreparable injury consisting of prospective costs, insolvency of claimant, and unconstitutionality of the statute * * * Such alleged irreparable damages have been by the following authorities held not sufficient to make out a case of equity jurisdiction for the injunctive relief prayed for. (Citing authorities including *Continental Casualty Co. v. Lawson,* supra, and *North-*

western Stevedoring Co. v. Marshall, 41 F. (2d) 28, (CCA-9).[12]

* * * * * * *

"Let an order be presented vacating the restraining orders, denying injunctive relief, and dismissing the action."

It is clear that even the alleged unconstitutionality of the Act at which appellant grasps on in the last line of its argument[13] cannot now be properly urged as grounds for a temporary restraining order.

Although this court, speaking through the late Judge Kerrigan, did not seem to expressly rule in its opinion on the exact question now presented by appellant's first two assignments of error, an inspection of the transcript of record in that case on file in this court, discloses that the rule as hereinabove set forth and as contended for by Appellee Pillsbury must have been applied by the court in Northwestern Stevedoring Co. v. Marshall (1930), 41 F. (2d) 28. This is further indicated by Judge Bowen's citation of the opinion as authority on this point. It also is apparent from the obvious inference to be drawn from the language of the case where it was stated at page 29:

"The bill filed by appellants sought an interlocutory injunction and set forth the insolvency of Matheson and the impossibility of recovering back payments made to him under the award of the deputy commissioner pending determination of the case, in the event that the award should be

12. Parentheses ours.
13. Brief for Appellant, p. 18.

set aside or modified, as the irreparable injury claimed. * * *

"After hearing, the District Court entered its order denying appellant's application for an interlocutory injunction, and it is from this order that this appeal is taken. * * *

"* * * appellants invoked the equity jurisdiction of the court. They are therefore subject to the usual rules under which injunctive relief is granted. It is well settled that the granting of a preliminary injunction rests in the sound discretion of the trial court, and that, while it is not necessary that the court, before granting such injunction, be satisfied that the plaintiff will certainly prevail upon the final hearing of the cause, it is necessary that the showing made be sufficient to establish at least the possibility that the plaintiff may make out a case upon the merits. * * *

"Affirmed."

The transcript of record filed in the *Northwestern* case discloses that the application for an interlocutory injunction to stay payment of compensation pending final decision in the case was made on the ground that irreparable damage would otherwise ensue to applicants. This application was supported by an affidavit of the "carrier" which reads in part as follows:

"That the defendant, Martin Matheson, is insolvent, and if an interlocutory injunction is not issued herein staying the payment of the amounts required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payments will have

> to be made, and if the complainants herein are successful in this action, said payments cannot be recovered from the defendant Martin Matheson, and said complainants will lose the benefits of any favorable decision herein. That by reason thereof said complainants will suffer irreparable damage."

After hearing, District Judge Cushman denied the application for interlocutory injunction, applicant duly excepting thereto. This order was the sole error assigned on appeal, apparently being urged on the theory that claimant was insolvent and, therefore, any payments made under the award, pending final decision on the merits if eventually favorable to the applicants, could not be recovered from Matheson to the irreparable damage of the "carrier".

The above mentioned application, affidavit, order and single assignment of error must have been clearly before this court when it rendered its opinion, quoted from above, affirming Judge Cushman's order. We respectfully submit that the previous decision of this court in Northwestern Stevedoring Co. v. Marshall, supra, is *stare decisis* in the case at bar on the errors assigned by appellant.

Such a result is consistent with the intent of the Longshoremen's Act purposely designed to afford quick redress to the injured employee, his widow, or other surviving dependents. Its administration is committed to the Commission and its deputies. Section 21 (b) is intended to safeguard and preserve to the beneficiaries of the law the immediate relief ad-

ministratively ordered. It is well known that the vast majority, in fact practically all, of those workers for whose relief the Longshoremen's Act was passed, are without property and would be unable subsequently to return the weekly compensation payments made thereunder for the reason that the relatively small sum of money awarded as compensation must be necessarily expended as it is received in providing the necessities of life.

The law clearly recognizes the existence of this condition and Section 21 (b) is obviously intended to protect and aid in the payment of the compensation awarded to continue the existence, during disability, of the injured employee and his dependents thus provided for. If the employer could secure a stay of payments pending final decision by merely showing the inability of claimant to return the money, the employer could in almost every case temporarily cut off this necessary relief for which the Act provides. Doubtless, the law, carefully providing that stay of payment should not be allowed except upon the clear showing coupled with a judicial determination that *"irreparable damage"* would ensue to the employer, must have contemplated some other consequence to the employer, apart from the mere inability of an employer to collect back from one of its injured employees, or his dependents, such weekly compensation payments as might have been made under a compensation order pending final action by the court. Appellant's contention would be applicable in practically every case and thus the provision for speedy relief would be rendered of no effect and meaningless.

The decisions we have cited, rejecting appellant's contention, find further approval in the dictum of the Supreme Court, speaking through Chief Justice Hughes, in Crowell v. Benson, 285 U. S. 22, at page 44:

> "Payment is not to be stayed pending such proceedings unless, on hearing after notice, the court allows the stay on evidence showing that the employer would otherwise suffer irreparable damage. § 21 (b)."

In the final analysis appellant's entire argument rests upon two underlying fallacies. First, appellant apparently assumes that an appealing litigant has a natural and constitutional right in the federal courts to an automatic stay of execution upon taking an appeal, at least if he provides proper security for eventual payment of the award and costs. This assumption is necessarily predicated upon a second fallacious assumption that the right to an appeal is necessarily a natural and constitutional right also which must in all cases be supported, to be effective, by an automatic stay of execution until the matter can be determined by the highest court to which counsel may succeed in taking the case.

Both assumptions are generally erroneous. The right to a stay of execution pending appeal, as well as the right to an appeal in any case, is statutory and not a constitutional or natural right and can be modified, limited or abolished by Congress, and even may be taken away by the legislative body in its discretion.

Lott v. Pitman, 243 U. S. 588, 591;
Frank v. Mangum, 237 U. S. 309.

Therefore, since Congress unquestionably intended in Section 21 (b) of the Longshoremen's Act to provide that the execution of an award of compensation under said Act should not be stayed automatically pending an appeal, but only by injunction where a clear showing is made that "irreparable damage" would ensue to the employer, generally speaking an automatic stay of execution upon the institution of a proceeding for review of an award in the District Court is not possible. Only where a temporary injunction is properly applied for and granted pursuant to Section 21 (b) may compliance with the award be temporarily withheld.

CONCLUSION.

That claimants are financially irresponsible and have insufficient means now to respond to any judgment which appellant might recover against them is entirely indefinite and does not constitute a showing that appellant did, or would suffer irreparable damage because of the lower court denying its application for a temporary restraining order. On the contrary, appellant's showing deprived the lower court of discretion, requiring a denial of such application forthwith.

Assuming, however, that the lower court retained discretion to act on appellant's showing, the order denying the application was not an abuse of, or improvident exercise of discretion because no irreparable

damage existed and no specific finding of the same or the nature thereof could be made.

Dated, San Francisco,
October 6, 1937.

Respectfully submitted,

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